No. 83-185

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SYLVIA COOPER, *et al.*,

Petitioners,

v.

FEDERAL RESERVE BANK OF RICHMOND

PHYLLIS BAXTER, *et al.*,

Petitioners,

v.

FEDERAL RESERVE BANK OF RICHMOND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

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TABLE OF AUTHORITIES

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PETITIONERS' REPLY BRIEF

This case presents two distinct issues, one essentially factual, the other

legal. First, did the district court in the Cooper action in fact decide whether or not petitioners Baxter, Gilliam, Knott, Harrison and McCorkle had been rejected for promotions because of racial discrimination? Second, if the district court in Cooper did not thus decide the individual claims of the Baxter plaintiffs, can the decision in Cooper nonetheless bar litigation of those unresolved claims in a later case?

We explained in our initial brief that the Baxter plaintiffs attempted on three different occasions to obtain a resolution of their claims in Cooper, and that in each instance the bank adamantly and successfully argued against consideration of those claims by the district court. (Pet. Br. 35-38.) We noted as well that in its

opinions of October 30, 1980,[1] May 8, 1981,[2] and May 29, 1981,[3] the district court expressly stated that its finding regarding Grades 6 and above was only that there had been insufficient evidence of "classwide" discrimination. The bank, however, argues that the district court resolved the merits of the Baxter plaintiffs' claims in its Findings of Fact and Conclusions of Law, and that the district court there held that each of the Baxter plaintiffs had been denied the disputed promotion for legitimate non-racial reasons. (Resp. Br. 13-16.) The bank, of course, can point to no finding of non-discrimination which actually mentions Baxter, Gilliam, Knott, Harrison or McCorkle by

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1/ P.A. 194a.

2/ Pet. Br. 42, text at note 20.

3/ P.A. 287a.

name. Rather, the bank relies solely on the following passage from the Conclusions of Law:

> 27. The Court concludes that there was no showing that the bank had discriminated against black employees with respect to promotions out of Grades 6 and above, and that defendant did not violate Title VII or 42 U.S.C. § 1981 with respect to promotions out of Grades 6 and above. (P.A. 285a)

The bank urges that paragraph 27 held, not only that there had been no classwide discrimination in Grades 6 and above, but also that not a single black employee in Grades 6 and above had ever been the victim of any isolated act of discrimination.

This construction of paragraph 27 is clearly mistaken. First, paragraphs 7 and 11 of the same Conclusions of Law, (P.A. 267a, 272a), expressly held that plaintiffs Cooper and Russell, both of whom were in Grade 6 or above, had been denied promo-

tions because of racial discrimination. Thus, paragraph 27 cannot mean there had never been any discrimination in those grades. Second, in a separate order denying Baxter's motion to intervene, an order issued on the same day as the Findings of Fact and Conclusions of Law, the district judge described those Findings of Fact and Conclusions of Law as having held only that there was "no proof of any class-wide discrimination above grade 5." (P.A. 287a.) (Emphasis added). Third, since the district judge had announced during the Cooper trial that he would not decide the claims of the Baxter plaintiffs (Pet. Br. 36), the general language of paragraph 27 cannot plausibly be read as containing any such decision. Fourth, where the Conclusions of Law do reject the claims of individuals, this is done expressly and in detail; the allegations of plaintiffs

Moore and Hannah are thoroughly discussed and unambiguously rejected in paragraphs 13-16. (P.A. 274a-777a.) Had the district court intended to reject as well the claims of Baxter, Gilliam, Knott, Harrison and McCorkle, it certainly would have done so with equal specificity.

If this Court has any doubts regarding the meaning of paragraph 27, it should remand that issue for resolution by the district court. The district judge who personally drafted paragraph 27 is clearly in the best position to resolve any perceived ambiguity in its language. There is no need or justification for the appellate courts to speculate about the scope of that finding so long as the trial judge is available to resolve the matter in the most authoritative possible manner.

The second issue presented by this case is whether, in the absence of a

determination of the specific claims of individual class members, a mere finding that there was no pattern of classwide discrimination bars, as a matter of res judicata, the litigation of those individual claims. But while the nature of this issue is clear, the position of the bank is not. Rather than squarely asserting that res judicata could bar litigation of individual claims that were not in fact adjudicated in a prior class action, the bank repeatedly characterizes the earlier class action opinion in vague language which artfully obscures the nature of the issue. The bank asserts, for example:

> Petitioners are bound by the adverse judgment in the prior class action. (Resp. Br. 4) (Emphasis added).

The ingeniously ambiguous word "adverse," a term used more than a dozen times in

Respondent's brief,[4] invites the Court to confuse and equate a prior decision that there was no pattern of classwide discrimination in Grades 6 and above with a prior decision that the individual Baxter plaintiffs had not been the victims of discrimination. Either type of prior decision could be characterized as "adverse" to the Baxter plaintiffs, but the res judicata consequences of the two are obviously very different. Elsewhere the bank urges the Court to hold that res judicata applies to "the range of issues determined in the class action,"[5] without explaining whether the phrase "range of issues" in this proposed rule encompasses

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4/ Resp. Br., pp. ii, 1, 4, 6, 17, 20, 21.

5/ Resp. Br. 5, 29.

issues not in fact so decided in the class action.[6/]

At one point in its brief the bank concedes that the doctrine of res judicata has traditionally been applied only where there has been a "final judgment on the merits of an action ...." (Resp. Br. 6.) If that is the bank's position, then a decision by this Court that the district court did not resolve the merits of the Baxter claims would be dispositive of this case. Other passages in the bank's brief, however, seem to suggest a far different rule, that once a class is certified, the class members who do not opt out are forever barred from bringing individual lawsuits, regardless of whether, or why,

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6/ Similar confusion is invited by other passages in Respondent's Brief. At page 7, for example, the bank coyly states that the issue of discrimination in promotions was "resolved against the Petitioners" in Cooper.

their claims are not in fact resolved in the class action. On that view, res judicata would apply to a case such as this in which the district court, having found no classwide discrimination, believed it was precluded from adjudicating the individual claims because of this Court's decision delineating the bifurcated trial process in International Brotherhood of Teamsters v. United States, 431 U.S. 360, 360-62 (1977). The Boeing Company, an amicus in this case and the petitioner in No. 83-185,[7/] apparently supporting this approach, argues that res judicata should apply to a case such as Edwards v. Boeing-Vertol Co., 717 F.2d 761 (3d Cir. 1983), in which an individual's claim was not adjudicated in an earlier class

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7/ Boeing Vertol Co. v. Edwards.

action because the courts in that class action had lacked jurisdiction over his claim. See 717 F.2d at 767. Similar reasoning would extend res judicata effect to decisions in class actions refusing to adjudicate the class or individual claims because of improper venue, forum non conveniens, failure to exhaust administrative remedies, or subsequent redefinition of the class.

None of the authorities relied on by the bank would support any such radical alteration of the law of res judicata. The bank cites five decisions which it asserts hold that "'individual claims' are encompassed in the class action and thus represent the 'same cause of action' and may not be re-litigated." (Resp. Br. 7.)[8/]

8/ Kemp v. Birmingham News Co., 608 F.2d 1049 (5th Cir. 1979); Fowler v. Birmingham

But every one of these cases involved an individual lawsuit seeking to relitigate issues that had in fact been settled by a prior class action consent decree; none of them suggests that res judicata could apply to claims that were not actually resolved by a consent decree or in some other fashion. The bank describes Croker v. Boeing Co., 662 F.2d 975, 997 (3d Cir. 1981), as dismissing

> as barred by res judicata two individual claims 'because they were not named plaintiffs but Oatner were class-member witnesses whose classwide claims had been unsuccessful' in the earlier class action. ... (Resp. Br. 10)

8/ (continued)

News Co., 608 F.2d 1055 (5th Cir. 1979), Dosier v. Miami Valley Broadcasting Corp., 656 F.2d 1259 (9th Cir. 1981); Woodson v. Fulton, 614 F.2d 940 (4th Cir. 1980); Dalton v. Employment Security Comm'n, 671 F.2d 835 (4th Cir.), cert. denied, 74 L.Ed.2d 117 (1982).

This characterization of Croker is entirely inaccurate. No reference to any res judicata issue is to be found at the cited page. The two individual claimants in Croker were not permitted to litigate their claims in that case solely because they had not yet met the jurisdictional prerequisite of a Title VII action by filing a charge with the EEOC. See 662 F.2d at 997.

Both of the courts below asserted that petitioner Harrison was a Grade 3 employee. In our principal brief we discussed the manner in which the legal position of a Grade 3 employee differed from that of a Grade 6. (Pet. Br. 53-56, 64-65.) Since then, however, the bank has called to our attention documents outside the record which demonstrate that Harrison was in fact a Grade 6. Accordingly, we agree with the bank that Harrison's position is the same as that of the other petitioners.

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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